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RESPONSE

THE EMPTY PROMISE OF COMPASSIONATE CONSERVATISM: A REPLY TO JUDGE WILKINSON

*William P. Marshall**

INTRODUCTION

CONSERVATIVE jurisprudence is in the midst of an identity crisis. After having been relegated to the sidelines during the Warren and early Burger Court eras, conservative jurists have solidified their control of the federal courts. In exercising this newfound power, however, conservatives have faced significant challenges created by their dominance. They have learned the agonizing lesson that it is far easier to criticize from the outside than it is to rule. Doctrines and principles that can be purely espoused when one is out of power are harder to maintain after one takes the reins of control.

Adhering to long-standing doctrines and principles is particularly troublesome when those tenets limit the authority of those in control. Doctrines and principles are far less attractive when they serve to limit one's own authority than when they limit the power of one's ideological opponents. This dilemma has been particularly problematic for conservatives because for many years the centerpiece of their jurisprudential agenda was the call for judicial restraint. Conservatives consistently condemned as judicial activism judicial decisions that overturned the actions of elected officials.¹ Greater deference to popularly enacted provisions, conservatives claimed, was necessary to the rule of law.²

Things have changed. The conservatives' internal conflict between exercising their judicial dominance and adhering to tenets

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¹ Richard Posner, *The Federal Courts: Challenge and Reform* 326 (1996); Richard Posner, *The Federal Courts: Crisis and Reform* 207–08, 211 (1985).

² See *Romer v. Evans*, 517 U.S. 620, 636, 646–47 (1996) (Scalia, J., dissenting).

that would constrain their use of judicial power has been resolved in favor of the former. Conservatives now freely justify judicial invalidations of popularly enacted legislative provisions,³ and they express little discomfort about the legitimacy of other forms of activism as well.⁴ The actual effects of this less restrained conservatism are apparent. Conservative majorities on the United States Supreme Court have been striking down federal legislation in an unprecedented number of cases⁵ and overturning, or undermining, countless disfavored precedents.⁶

Defending a more activist judicial agenda, however, is only part of the conservatives' challenge. The other part is developing the justifications in support of that agenda. After all, if both liberals and conservatives are engaging in activism, the question must be asked: Why is a conservative judicial agenda more attractive than a liberal one?

It is precisely this question that is addressed by Judge J. Harvie Wilkinson III in his eloquent essay, "Why Conservative Jurisprudence Is Compassionate."⁷ Judge Wilkinson's project is to defend conservative jurisprudence against a claim that he believes unfairly derogates its normative attractiveness—specifically, that conservative jurisprudence lacks compassion.⁸ Accordingly, he takes on the purported misperception that liberal jurisprudence is compassionate while conservative jurisprudence is not. To Judge Wilkinson, conservative jurisprudence, properly understood, can "more than

³ See J. Harvie Wilkinson III, *Is There A Distinctive Conservative Jurisprudence?*, 73 U. Colo. L. Rev. 1383, 1385–89 (2002) (defending the Court's federalism decisions striking down congressional enactments).

⁴ See, e.g., Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?*, 109 Yale L.J. 1535, 1545 (2000) (arguing that courts need not defer to stare decisis).

⁵ See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80, 85 (2001) (exploring methodologies employed by the Rehnquist Court that "have resulted in a growing disrespect for Congress" by invalidating federal legislation); Seth P. Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1074 (2001) (pointing out that the Rehnquist Court has invalidated twenty-six different federal enactments since 1995).

⁶ See William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. Colo. L. Rev. 1217, 1232–36 (2002) and cases cited therein.

⁷ J. Harvie Wilkinson III, *Why Conservative Jurisprudence Is Compassionate*, 89 Va. L. Rev. 753 (2003).

⁸ Judge Wilkinson defines compassion as "the extension of empathy, kindness, and concern for one's fellow human beings." *Id.* at 753.

hold [its] own” against its liberal counterpart in the compassion debate.⁹

Judge Wilkinson is both an accomplished jurist and one of the nation’s leading legal scholars, and his defense of judicial conservatism will deservedly be influential.¹⁰ His account of judicial conservatism is thoughtful and compelling and provides important and considerable insights into conservative legal thought. It is also immensely provocative in that it seeks to defend conservative jurisprudence on grounds not normally associated with conservatism.¹¹ As this Essay will suggest, however, Judge Wilkinson’s thesis is, in the end, unpersuasive. Contemporary conservative jurisprudence is not the dispassionate system of legal decisionmaking he describes. Rather, it is a system that consistently reinforces the rights and prerogatives of entrenched interests while minimizing the protections accorded marginalized and disaffected groups. The compassion in such jurisprudence is difficult to discern.

I. THE DEFENSE OF CONSERVATIVE JURISPRUDENCE AS COMPASSIONATE

Judge Wilkinson begins his essay by targeting the caricature that liberal jurisprudence protects deserving individuals and is therefore

⁹Id.

¹⁰Indeed, Judge Wilkinson’s essay was cited and discussed even before publication. See, e.g., George F. Will, *One Judge’s Conservatism*, Newsweek, Mar. 3, 2003, at 68, 68 (“When next there is a Supreme Court vacancy, Wilkinson’s measured jurisprudence might make him the ideal nominee to silence those whose arguments against judicial conservatism range from the unpersuasive to the offensive.”).

¹¹Despite its academic tenor, however, “Why Conservative Jurisprudence Is Compassionate” is also politically charged. At present, the national debate over judicial nominations has reached new levels of acrimony in anticipation of potential Supreme Court retirements and in the ongoing controversies over whether Bush Administration nominees to the lower courts are too conservative. See, e.g., Helen Dewar, *Polarized Politics, Confirmation Chaos: Retribution Appears Evident in Nominations Since the Late 1980s*, Wash. Post, May 11, 2003, at A5. Judge Wilkinson’s description of judicial conservatism as “compassionate” injects him directly into this controversy. “Compassionate conservatism” has been the catchphrase used by the President to describe and engender support for his domestic policies. See, e.g., Press Release, The White House, *Fact Sheet: Compassionate Conservatism* (Apr. 30, 2002), at <http://www.whitehouse.gov/news/releases/2002/04/print/20020430.html> (on file with the Virginia Law Review Association). Any defense of a compassionate, conservative jurisprudence must therefore be seen as a defense of the Bush Administration’s judicial nominations agenda.

humane, while conservative jurisprudence protects big business and government and rigidly adheres to bright-line rules in the face of sympathetic circumstances and is therefore callous and unfeeling.¹² Such a caricature, as Judge Wilkinson notes, is certainly not as descriptively accurate as it might pretend,¹³ but he is less concerned with attacking the accuracy of the stereotype than he is with unpacking its normative assumptions. Accordingly, he attempts to show how a liberal jurisprudence that favors individuals “appear[ing] at the courthouse doors armed with poignant circumstances” is not necessarily as humane as it would like to believe.¹⁴ On the other side, a conservative jurisprudence that rejects such claims in deference to sharper rules of law, and to the interests of collective entities such as business or government, is not as callous as has been charged.¹⁵

Judge Wilkinson raises three interrelated arguments in support of this proposition. First, he contends that relying on compassion alone as a tool for deciding cases is not appropriate for judicial action.¹⁶ Reason and an understanding of consequences must attend judicial decisionmaking no matter how that decisionmaking may be informed by sympathy; otherwise, decisions based on compassion may end up “hurting the very people one’s compassion is intended to help.”¹⁷ Second, favoring the individual over the collective is not always compassionate. There are individuals in the collective as well, Judge Wilkinson reminds us, and advancing the interests of one individual over the interests of others might create its own set of harms.¹⁸ For this reason, compassion in judicial decisionmaking can be a double-edged sword. Judge Wilkinson asserts that compassion exists, for example, on both sides of products liability cases and criminal prosecutions. Excessive plaintiffs’ awards can “drive up prices and keep needed products off the market,”¹⁹ while freeing criminal defendants tends to exact its greatest costs on minorities

¹²Wilkinson, *supra* note 7, at 754–57.

¹³*Id.* at 757 (citing Charles Fried & Ronald Dworkin, ‘A Badly Flawed Election’: An Exchange, *N.Y. Rev. Books*, Feb. 22, 2001, at 8).

¹⁴*Id.* at 756.

¹⁵*Id.* at 766–67.

¹⁶*Id.* at 761–63.

¹⁷*Id.* at 764.

¹⁸*Id.* at 766–67.

¹⁹*Id.* at 768.

and the poor because “victims of crime are disproportionately the most vulnerable members of society.”²⁰ Third, although offered more tentatively, Judge Wilkinson argues in favor of conservative jurisprudence’s predilection toward bright-line rules.²¹ Bright-line rules, he asserts, “embod[y] the virtues of advance notice, uniform and consistent treatment, and respect for whatever democratic process may have brought the rule about.”²² They are therefore preferable to the liberals’ purported tendency to bend rules in a system of judicial “exceptionalism” designed to accommodate a particularly deserving litigant’s special circumstances.²³ Recognizing that adherence to bright-line rules may be a matter of degree, however, Judge Wilkinson is quick to assure that bright-line rules should not “carry the day in each and every circumstance.”²⁴

Judge Wilkinson’s arguments obviously hold some resonance. Clearly a jurisprudence based solely upon sympathy for those in plight would not be much of a jurisprudence.²⁵ Similarly, his position is sound in that when determining the most compassionate course of action, the interests of collective entities as well as individual litigants must be considered.²⁶ The concern for compassion can be on both sides of particular issues.²⁷ Finally, there is merit in

²⁰ *Id.* at 769.

²¹ *Id.* at 760–61.

²² *Id.* at 760.

²³ See *id.* at 760–61.

²⁴ *Id.* at 761.

²⁵ Although, interestingly enough, an entire judicial system (equity) was built upon the need to mitigate the harshness of rigid rules of law on particular litigants. See, e.g., J.H. Baker, *An Introduction to English Legal History* 106 (4th ed. 2002) (“The office of the chancellor is to correct men’s consciences for frauds, breaches of trust, wrongs and oppressions of what nature soever they be, and to soften and mollify the extremity of the law.” (quoting *Earl of Oxford’s Case*, 21 Eng. Rep. 485, 486 (1615))).

²⁶ Protecting the individual litigant, however, may also provide benefit to those who, although represented in the collective entity in the suit against that particular plaintiff, may on another day be injured litigants themselves.

²⁷ Of course, just because compassion can be on both sides of an issue does not mean that it is equally apportioned. Consider for a moment the products liability example raised by Judge Wilkinson. Wilkinson, *supra* note 7, at 767–68. Tort rules that promote cost sharing, for example, are designed to maximize compassion by assuring that those most grievously affected by a particular action obtain relief in a manner that only marginally affects those who incur compensation expenses. Moreover, while it is true that excessive damages may have harmful effects, it is also true that the fear of those damages has made our society one of the safest in the world. In that sense,

his defense of bright-line rules and his recognition that such rules have their limitations.²⁸

Nevertheless, even if one recognizes the validity of these arguments, they still fall short of the goal of defending contemporary conservative jurisprudence as compassionate. To begin with, they suggest at most that individualized compassion may be an ill-fitting foundation for a system of justice because it is jurisprudentially limited and does not foresee adverse consequences. That is, it creates a jurisprudence of “exceptionalism” and does not recognize that compassion can often be implicated on both sides of disputes. These are, however, essentially negative points about the purported over-use of compassion in liberal jurisprudence; they are not positive propositions suggesting that conservatism has its own unique vision or understanding of compassion.²⁹

More importantly, however, as discussed in Part II of this Essay, Judge Wilkinson’s attempt to defend conservative jurisprudence is misplaced because the conservatism he describes is not contemporary conservative jurisprudence. The judicial conservatism that is at the center of the current political debates over judicial nominations and the “polarization” of legal culture that Judge Wilkinson rightly

the compassion underlying tort law has worked to the advantage of both individual plaintiffs and society as a whole.

²⁸ Judge Wilkinson’s apparent approval of recidivist sentencing statutes, see *id.* at 759–60, however, might give one pause as to whether he believes compassion is at all relevant to the question of when bright-line rules should be abandoned. This past Term in *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003), for example, the Court upheld two consecutive terms of twenty-five years to life in prison under California’s “three strikes” law for a defendant who, on two separate occasions, stole five and four videotapes respectively. *Id.* at 1169–70, 1175–76. The defendant had previously been convicted of three counts of first degree burglary, so each of the videotape theft convictions triggered a separate application of the three strikes law. *Id.* at 1170–71. Judge Wilkinson might respond that the “compassion” in this result is either in its deference to majoritarian action or in its concern for crime victims, but neither response would be satisfactory. The former suggests that majoritarian action should be deferred to reflexively solely because it is majoritarian action—a position Wilkinson himself appears to reject in another writing. See Wilkinson, *supra* note 3, at 1388–89, 1399. The latter suggests that given the harshness of the penalty in relation to the minimal injuries inflicted on the victims, the meaning of compassion has very little content.

²⁹ Significantly, Judge Wilkinson does not offer a paradigmatic case or example that reflects a uniquely conservative vision of compassion. Rather, virtually all of the examples he uses are aimed at showing that compassion is not always solely on the side of the individual litigant.

decries³⁰ is the dominant contemporary jurisprudence of the Justices on the conservative wing of the Supreme Court. These are the Justices whom the President has declared the models for his judicial appointments and for his compassionate conservative agenda³¹ and whom Judge Wilkinson himself cites as examples of conservative thought.³² The meaning of compassionate conservative jurisprudence, accordingly, can only be understood with the jurisprudence of these Justices in mind. As Part II demonstrates, however, contemporary conservative jurisprudence does not comport with the account of conservatism offered by Judge Wilkinson. In fact, in order to achieve desired results, conservative Justices have relied upon exactly the type of untethered compassion that Judge Wilkinson condemns as illegitimate.³³ Accordingly, if Judge Wilkinson's effort is an attempt to defend the Court's conservative jurisprudence and/or the judicial agenda of the current Administration, it assuredly fails.

Finally, as discussed in Part III, Judge Wilkinson's attempt to defend contemporary conservative thought against liberal attack is misdirected because the dichotomy he describes is not the primary line that currently divides the conservative and liberal camps. The division is not between a jurisprudence that inappropriately responds to individual poignancies and one that relies on sharp lines and collective concerns. (As shown in Part II, both sides can be criticized on this count.) Rather, the essential division is between a liberal jurisprudence geared toward protecting the marginalized groups in society and a conservative jurisprudence that tends to reinforce the existing powers of dominant groups. As Part III demonstrates, conservatives have taken their role in protecting entrenched interests quite seriously. They have expanded the constitutional rights of already powerful interests. They have opposed liberal attempts to increase the constitutional protections accorded marginalized groups. They have invalidated legislative attempts that would reduce the disparities between the powerful and the marginalized in the political market-

³⁰Wilkinson, *supra* note 7, at 771.

³¹See, e.g., Dewar, *supra* note 11 (identifying Justices Scalia and Thomas as models for President Bush's judicial appointment); Press Release, The White House, *supra* note 11 (outlining President Bush's vision of "compassionate conservatism").

³²Wilkinson, *supra* note 7, at 756–57, 757 nn.9–10.

³³See *infra* notes 49–79 and accompanying text.

place. They have consistently resisted both constitutional and legislative attempts to increase the access of disadvantaged litigants to courts of justice. Accordingly, as the Conclusion suggests, the claim that such a jurisprudence is “compassionate” is difficult to sustain.

II. THE SELECTIVELY COMPASSIONATE CONSERVATIVE

The image of the conservative judge reluctantly turning away poignant litigants because she understands that giving in to sympathies may be counterproductive or affirmatively harmful is an attractive one. It is a description, however, that does not capture the conservative wing of the Supreme Court. Part of the image is true—the conservative wing often turns away sympathetic litigants.³⁴ Yet it is also true that in other cases the conservative wing seems moved by sympathy in the exact way that Judge Wilkinson condemns—it is just that the objects of its compassion are more often the relatively empowered rather than the dispossessed.

Property owners, for example, seem to be particular beneficiaries of the conservatives’ sympathies. In a series of cases, Court conservatives have sided with landowners in sustaining constitutional attacks against zoning, environmental protection, and land use restrictions. In so doing, the conservatives have applied the stringent standards of review more akin to those found in civil rights or civil liberties cases than economic regulation.³⁵ They have also, in these cases, moved away from the type of bright-line rules applauded by Judge Wilkinson³⁶ to a multifaceted, case-by-case inquiry that makes the application of law in this area increasingly unpredictable.³⁷ The result of these decisions, naturally, is either to deter

³⁴ See, e.g., *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 202–03 (1989) (holding that the state’s failure to act to protect a child from abuse does not violate the Due Process Clause and stating that although judges are “moved by natural sympathy” for a young boy beaten to the point of severe brain damage by his father, it is best to avoid “yielding to that impulse” in determining the liability of the Department of Social Services for its role in knowingly leaving the boy in a home with a long history of physical abuse).

³⁵ See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 842–44 (1987) (Brennan, J., dissenting). The majority held that the Coastal Commission’s decision to condition a permit for property renovations on the landowners’ agreement to allow a public easement across their beach constituted a taking. *Id.* at 841–42.

³⁶ Wilkinson, *supra* note 7, at 760.

³⁷ See *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1418 (2003) (describing regulatory takings jurisprudence as characterized by “essentially ad hoc, factual in-

such restrictions or force communities enacting them to risk incurring high damage awards, including attorneys' fees.³⁸

Like the injured plaintiffs in products liability cases discussed by Judge Wilkinson,³⁹ the property owners in the takings cases often present sympathetic circumstances.⁴⁰ It is therefore illuminating to compare the products liability and takings cases under Judge Wilkinson's framework. Judge Wilkinson argues that we should question whether sustaining such large awards for individual plaintiffs in products cases is truly compassionate because jury awards may threaten the viability of some enterprises and the availability of goods to those who need them the most.⁴¹ As he points out, on the other side of products litigation are the personalized interests of the nonlitigant consumers.⁴² The same, however, can be asserted with respect to the conservatives' enforcement of takings claims. Inhibiting community efforts to improve flood drainage,⁴³ to pro-

quiries'" (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)); Christopher P. Yates, *Reagan Revolution Redux in Takings Clause Jurisprudence*, 72 U. Det. Mercy L. Rev. 531, 532–33, 559–61 (1995) (arguing that the Court's recent shift in takings jurisprudence has decreased land use planners' ability to predict when a contemplated restriction or condition will constitute a compensable taking); Tyrone T. Bongard, Comment, *Does Palazzolo v. Rhode Island's Upholding of the Transferability of Takings Claims Require a Rethinking of Takings Jurisprudence?*, 81 N.C. L. Rev. 392, 393 (2002) (noting the increasing complexity of the takings inquiry).

³⁸In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court made defending against takings claims even more onerous when it imposed an additional barrier to land use restrictions by "abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan." *Id.* at 405 (Stevens, J., dissenting). The city of Tigard conditioned the Dolans' commercial development permit, in part, on dedication of a strip of their land to be used as a pedestrian/bicycle pathway, which was to help offset a projected increase in traffic as a result of the development. *Id.* at 377–78. The majority conceded that generally a party challenging a land use regulation carries the burden to prove it arbitrary. *Id.* at 391 n.8. Nevertheless, the Court held that the burden rested with the city to demonstrate with quantifiable findings that the path would, or was likely to, reduce traffic. *Id.* at 395–96.

³⁹Wilkinson, *supra* note 7, at 767–69.

⁴⁰In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006–07 (1992), for example, the landowner purchased oceanfront property for \$975,000 in order to build single-family homes. Subsequently enacted anti-erosion legislation, however, prohibited home construction on the property, virtually eliminating its commercial value. *Id.* at 1007.

⁴¹Wilkinson, *supra* note 7, at 767–69.

⁴²*Id.* at 768–69.

⁴³*Dolan*, 512 U.S. at 378–79.

mote public access to natural resources,⁴⁴ to combat erosion,⁴⁵ or to preserve threatened wetlands⁴⁶ also inflicts personalized injury on the members of the collective community. Indeed the effects on collective interests may be more egregious than those caused by the random products liability case because natural resources are unique and finite. It is one thing, for example, for a potentially dangerous product to never reach the market; it is another for a natural resource to be lost forever.

A similar point can be made in contrasting the conservatives' takings jurisprudence with the police brutality cases also discussed by Judge Wilkinson. Judge Wilkinson argues that we should be cautious about adopting rules imposing liability on the police that are so harsh as to deter effective police action.⁴⁷ An inert police force stilled from acting because of fear of liability is of little assistance to potential crime victims. Yet this observation also applies to town zoning boards and state environmental protection agencies. Do we want to discourage communities from implementing flood control plans, fighting erosion, or preserving scarce natural resources?⁴⁸

Perhaps the most telling example of the conservatives' bending to their sympathies occurred in *Payne v. Tennessee*, where a conservative majority held that victim impact testimony was admissible in the sentencing phase of a death penalty case.⁴⁹ To begin with, the conservative Justices in *Payne* immediately made it clear they were not going to be bothered by principles of judicial restraint. In

⁴⁴ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827–29 (1987).

⁴⁵ See *Lucas*, 505 U.S. at 1007–08.

⁴⁶ *Palazzolo v. Rhode Island*, 533 U.S. 606, 611 (2001).

⁴⁷ *Wilkinson*, supra note 7, at 766–67.

⁴⁸ The conservative solicitude for property owners, moreover, extends beyond the substantive issues present in takings cases—it also extends to the conservatives' leniency with respect to property owner litigants' access to the courts. The leading case on this point is *Palazzolo*, 533 U.S. at 627, in which the conservative-led majority held that a property owner could maintain a takings challenge even if she succeeded to the property after the challenged restriction was enacted. This holding is literally an invitation to wear down the resistance of zoning boards by encouraging strategic behavior by those intent on challenging land restrictions. It also stands in stark contrast to the conservatives' opinions in habeas cases where their dominant theme has been to minimize litigation challenging the legality of government action. See, e.g., *Teague v. Lane*, 489 U.S. 288, 297–98 (1989) (limiting the types of claims that may be raised in habeas corpus petitions).

⁴⁹ 501 U.S. 808, 827 (1991).

their rush to allow the admission of victim impact testimony, the conservatives overturned precedents of only two⁵⁰ and four years,⁵¹ indicating that “conservative” rules of jurisprudence such as adherence to stare decisis were not going to serve as a bar to achieving their desired result.⁵² The purported conservative affinity for bright-line rules that would normally prohibit overturning such short-lived precedents was nowhere to be found in the conservative majority’s opinion.

Still, it was in the merits of the case where the conservatives truly established they could promote the type of emotionally-laden judicial jurisprudence so ably criticized by Judge Wilkinson. As noted above, the question in *Payne* was whether victim impact testimony could be presented to a jury during the sentencing portion of capital cases. In *Payne* itself the evidence sought to be introduced was the testimony of a child’s grandmother about the effects that the murder of the child’s mother and sister had on the three-year-old boy.⁵³ The offered testimony was as follows:

He cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I’m worried about my Lacie.⁵⁴

To this the state prosecutor added the following:

Somewhere down the road Nicholas is going to grow up, hopefully. . . . And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of jus-

⁵⁰ *South Carolina v. Gathers*, 490 U.S. 805, 810–11 (1989) (holding victim impact evidence inadmissible).

⁵¹ *Booth v. Maryland*, 482 U.S. 496, 502–03 (1987) (holding victim impact evidence inadmissible).

⁵² See *Payne*, 501 U.S. at 849 (Marshall, J., dissenting) (“[S]tare decisis . . . is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.” (citations omitted)).

⁵³ *Id.* at 814.

⁵⁴ *Id.* at 814–15.

tice was done. He is going to want to know what happened. With your verdict, you will provide the answer.⁵⁵

Not surprisingly, the defendant in *Payne* was sentenced to death.⁵⁶

The conservatives' decision in *Payne* is problematic in a number of respects, including that the compassion toward the crime victim expressed in *Payne* is inconsistent with the conservatives' approach in other areas.⁵⁷ The problems in *Payne*, however, run far deeper than mere inconsistency. What is most troubling about *Payne* is the extent to which it permits the state to use unbridled compassion for the victim as part of its death penalty calculus. The inclusion of victim impact testimony means the death penalty decision is posed to the jury in terms of whether the victim is so deserving as to have the death penalty imposed on her behalf. It is not framed in terms of the moral culpability of the defendant—the appropriate focus of criminal sentencing. As Professor Angela Harris writes, instead of focusing on the defendant's moral culpability, the jury is asked literally to act as “the agent of the grieving family.”⁵⁸ (In *Payne* itself, for example, the prosecutor urged the jury to make the decision “for Nicholas.”⁵⁹) The implication, of course, is that if the jury fails to recommend the death penalty, it has abandoned its duties (and sympathies) toward the survivors and the deceased. The message to the jury is clear: “[M]ercy to the guilty is cruelty to the innocent.”⁶⁰

⁵⁵ Id. at 815.

⁵⁶ Id. at 816.

⁵⁷ As Professor Susan Bandes argues, the conservative Justices had no trouble invoking the merits of compassion towards crime victims in *Payne*, yet in cases such as *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 191–93 (1989), in which the state was sued for repeatedly and knowingly returning a boy to his abusive father until he was beaten into a coma, the conservatives indicated that compassion was an invalid ground for decision in civil rights cases. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361, 362 (1996).

⁵⁸ Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 Sup. Ct. Rev. 77, 93.

⁵⁹ Id. at 101.

⁶⁰ Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 Geo. L.J. 1691, 1710 (1997) (internal quotations omitted). As Professor Angela Harris explains, the focus on victim impact evidence effectively changes the nature of the criminal trial. The focus of the sentencing stage of the trial is no longer the state versus the defendant. Rather, it becomes a trial between the defendant and the victim: “[T]he death penalty is privatized.” Harris, *supra* note 58, at 98–99.

The non-rational effects of victim impact statements on the sentencing jury cannot be overstated. Professor Susan Bandes explains:

Victim impact statements evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger. These emotional reactions have a crucial common thread: they all deflect the jury from its duty to consider the individual defendant and his moral culpability.⁶¹

Moreover, as Bandes states, “the problem with victim impact statements is not that they evoke emotion rather than reason,” but that “they evoke unreasoned, unreflective emotion that cannot be placed in any usable perspective.”⁶² One would think, therefore, that under a regime of conservative jurisprudence, victim impact statements should be the first type of evidence to be excluded from jury consideration. After all, as Judge Wilkinson writes, “[t]he jury is supposed to render a verdict on the evidence, not on the basis of sympathy or speculation.”⁶³

One would also think that victim impact testimony should be excluded under Judge Wilkinson’s approach because of the harms that such testimony causes to the broader collective concerns about the role race plays in capital sentencing. As numerous scholars have indicated, the predictable result of the admission of victim impact testimony is to enhance the role of the victim’s race in capital sentencing, thereby increasing the discrimination against minor-

⁶¹ Bandes, *supra* note 57, at 395 (citation omitted).

⁶² *Id.* at 401. Bandes concludes that victim impact statements should be suppressed because the jury does not need them to be able to consider “*each* victim’s ‘uniqueness as an individual human being.’” *Id.* at 406 (quoting *Payne*, 501 U.S. at 823). The jury already most likely identifies with the victim. “We feel empathy most easily toward those who are like us The feeling of identification with the victim of a crime often comes naturally.” *Id.* at 399–400; see also José Felipé Anderson, Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing, 28 Rutgers L.J. 367, 402 (1997) (“The average citizen is not minded to become a killer; nor does he lose much sleep over the possibility of being falsely accused of murder, such situations being rare. What he is worried about is becoming a victim.” (quoting Frank G. Carrington, *Neither Cruel Nor Unusual* 20 (1978))).

⁶³ Wilkinson, *supra* note 7, at 762.

ity defendants that is already endemic in the system.⁶⁴ In this respect, *Payne* must also be read in conjunction with *McCleskey v. Kemp*, the case in which a conservative-led majority held that it would not consider statistical evidence demonstrating that the death sentence was administered in a racially discriminatory manner.⁶⁵ According to the Court in *Kemp*, it would not consider evidence of systemic discrimination because the only issue for review was whether discrimination played a role in the sentencing of the defendant in the case at hand.⁶⁶ But why, in a regime of compassionate conservatism, should such evidence not be admissible while victim impact statements are? If Judge Wilkinson is right that we should be cautious about allowing personalized compassion to affect the administration of justice, we should at least examine evidence that indicates that bias or prejudice is systematically having an undue influence in a particular area of law. And such evidence should certainly cause us to pause before allowing the admission of emotionally laden evidence that will inevitably infuse even more personalized emotion into the system. The conservatives in the death penalty cases, in short, appear to have their compassion exactly backwards—too much solicitude for the individualized compassion that can overpower dispassionate deliberation in specific cases, too little concern for the compassion against racial minorities that pervades the system as a whole.

One other instance that deserves some mention in which sympathy appears to play a significant role in conservative jurisprudence involves the standing inquiry under Article III.⁶⁷ In this area, conservatives have shown a particular empathy toward white plaintiffs challenging legislative provisions benefiting minorities. Most of the time, in order for a litigant to have standing under Article III, the Court requires a showing that the plaintiff has suffered “injury in fact” that is “concrete and particularized” and not “conjectural or hypothetical.”⁶⁸ On this basis the Court has held, for example, that black plaintiffs lacked standing to challenge government support of

⁶⁴ Robert P. Mostellar, *The Effect of Victim Impact Evidence on the Defense*, 8 *Crim. Just.* 24, 28 (1993).

⁶⁵ 481 U.S. 279, 290–91 (1987).

⁶⁶ *Id.* at 292–93.

⁶⁷ U.S. Const. art III.

⁶⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

racially discriminatory schools on grounds that such government support was racially stigmatizing,⁶⁹ and that citizen plaintiffs could not challenge the government's giving land to a religious institution on grounds that it violated their rights under the Establishment Clause.⁷⁰ In both circumstances, the Court found the plaintiffs' injuries to be too abstract to satisfy Article III requirements.⁷¹ In *Shaw v. Reno*, a conservative majority held that white plaintiffs had standing to challenge a purported race-based redistricting plan,⁷² although the only seeming harm to the plaintiffs was the psychological affront of being forced to vote in a majority-minority district.⁷³ Apparently to the conservatives, the psychological harm suffered by white plaintiffs was constitutionally cognizable, while similar harms to other plaintiffs were not. A similar dichotomy can be found in comparing the conservatives' opinions on white plaintiff standing in affirmative action cases with their decisions concerning minority standing to challenge other allegedly discriminatory actions. In *Adarand Constructors v. Peña*,⁷⁴ white contractors were granted standing to attack a minority set-aside program, although they did not need to show that in the absence of the program they would have been awarded the government contract.⁷⁵ In non-affirmative action cases, low income and minority plaintiffs have been found to lack standing when their claims were equally attenuated.⁷⁶

⁶⁹ *Allen v. Wright*, 468 U.S. 737, 753 (1984).

⁷⁰ *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 482–83 (1982). The land was purportedly worth \$577,500. See *id.* at 468.

⁷¹ *Allen*, 468 U.S. at 753; *Valley Forge*, 454 U.S. at 483, 489.

⁷² 509 U.S. 630, 649 (1993).

⁷³ The white plaintiffs could not claim that their right to vote had been inappropriately diluted because under the conservatives' explanation of the merits of the case, the state could not presume political behavior from race status alone. See Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. Rev. 301, 314 (2002).

⁷⁴ 515 U.S. 200 (1995).

⁷⁵ *Id.* at 211 ("The aggrieved party 'need not allege that he would have obtained the benefit but for the barrier in order to establish standing.'" (quoting *Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993))).

⁷⁶ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (holding that low income plaintiffs did not have standing to challenge allegedly discriminatory zoning restrictions unless they could show that in the absence of the those restrictions there would be a substantial probability that they would be able to buy or lease property in the com-

As shown in Part III, these cases might be explained as examples of the conservatives' categorical preferences for protecting entrenched interests over marginalized groups. For present purposes, however, these cases are also examples of the conservatives' selective use of sympathy as the basis for influencing grounds of decision. As Professor Gene Nichol notes, the standing inquiry's emphasis on "injury in fact" requires a court to be able to empathize and understand the injury claim that is presented.⁷⁷ The standing cases thus establish that conservatives are apparently willing or able to empathize with white plaintiffs: They are, however, less generous in their compassion toward others. There is, of course, an underlying consistency in the conservatives' use of sympathy—in sympathizing with property owners and racial majorities, conservatives support the more economically and politically powerful segments of society.⁷⁸

Indeed, even the victim impact testimony cases reflect this pattern, as the inclusion of such testimony is likely to have its greatest effect when the victims are from racial majorities and/or higher socio-economic classes.⁷⁹ This pattern is not happenstance. As the next Part shows, conservative jurisprudence may be understood as systematically serving the interests of the more powerful segments of society—often to the detriment of the less advantaged.

munity); Albert Alschuler, Racial Profiling and the Constitution, 2002 U. Chi. L. Rev. 163, 251 (comparing the difficulty minorities have in challenging racial profiling with the relative ease white plaintiffs have in gaining standing in affirmative action cases).

⁷⁷ See Nichol, *supra* note 73, at 326–27.

⁷⁸ A notable exception to this trend is Justice Thomas's impassioned account in *Zelman v. Simmons-Harris* of the failure of public schools to satisfy the educational needs of inner-city black school children. 536 U.S. 639, 681–82 (2002) (Thomas, J., concurring). *Zelman* addressed the constitutionality of school voucher programs under the Establishment Clause. *Id.* at 676.

⁷⁹ One study found that "jurors who 'heard [victim impact evidence] about highly respectable . . . victims . . . rated these victims as more likeable, decent, and more valuable; felt more compassion for the victims' family; believed that the emotional impact of the murders on survivors was greater; and rated the crime as more serious.'" Theodore Eisenberg et al., Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases, 88 Cornell L. Rev. 306, 318 (2003) (quoting Edith Greene et al., Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?, 28 J. Applied Soc. Psychol. 145, 154 (1998)).

III. COMPASSION AND LIBERAL/CONSERVATIVE FAULT LINES

The previous Part demonstrates that conservative jurisprudence, like liberal jurisprudence, may be fairly critiqued as relying on the type of individualized sympathy for particular litigants that Judge Wilkinson condemns in his essay. Part II does not claim, however, that conservative jurisprudence is based entirely upon this type of decisionmaking. In fact there are many examples that can be offered in which conservatives have not been moved by individualized sympathy even when the injuries are to litigants with whom the conservatives might otherwise be expected to empathize.⁸⁰ At the same time, it is also incorrect to condemn liberal jurisprudence as one that bends to mindless sympathy and compassion every time a poignant litigant appears at the courthouse steps.⁸¹ While it may

⁸⁰ Justices Scalia and Thomas, for example, have steadfastly refused to endorse constitutionally mandated relief for business defendants from excessive awards in tort litigation. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1526 (2003) (Scalia, J., dissenting) (voting to uphold an award of \$145 million in punitive damages—where full compensatory damages were \$1 million—in favor of an insured who brought suit against State Farm for bad faith, fraud, and intentional infliction of emotional distress); *id.* (Thomas, J., dissenting) (same); *BMW of N. Am. v. Gore*, 517 U.S. 559, 598–99 (1996) (Scalia & Thomas, JJ., dissenting) (voting to uphold a \$2 million judgment against BMW for failing to disclose to purchasers that cars sold as new had been repainted after damage in shipping). Justices Scalia and Thomas have likewise consistently refused to find constitutional relief for hapless criminal defendants faced with draconian penalties in recidivist sentencing cases. See *Ewing v. California*, 123 S. Ct. 1179, 1190 (2003) (Scalia, J., concurring in the judgment) (upholding a minimum twenty-five year sentence under California’s “three strikes” law for a defendant whose triggering offense was stealing three golf clubs); *id.* at 1191 (Thomas, J., concurring in the judgment) (same); *Lockyer v. Andrade*, 123 S. Ct. 1166, 1169, 1175–76 (2003) (upholding two consecutive twenty-five years to life sentences under California’s “three strikes” law where the triggering offenses were stealing \$150 worth of videotapes).

⁸¹ See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998) (holding a high speed police chase resulting in the death of the plaintiff’s decedent did not violate due process where the police officer was not acting with purpose to harm the victim); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (holding due process does not protect a Michigan franchisee businessperson with little relationship to Florida from having to defend a lawsuit in that state brought by his franchisor). As the *Burger King* dissent argued, there was a “significant element of unfairness” in this decision. *Id.* at 487 (Stevens, J., dissenting); see also *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976) (holding that federal courts may refuse their “unflagging obligation” to exercise jurisdiction in cases properly brought before them and abstain from hearing a water rights claim brought by the United States as trustees for Indian tribes); *Schmerber v. California*, 384 U.S. 757, 758–59 (1966) (holding the ex-

be true that some “liberal” decisions may be criticized as overly responsive to the plights of sympathetic litigants,⁸² both liberal and conservative jurisprudence can be better understood as being guided by concerns broader than the plights of specific individuals.

In this respect, it is notable that Judge Wilkinson begins his essay with a discussion of *Dandridge v. Williams*, the 1970 Supreme Court case that upheld a state welfare cap of \$250 per month per family, regardless of the size of the family, against an equal protection challenge.⁸³ In his discussion of the case, Judge Wilkinson refers to the claim made by the plaintiffs and endorsed by Justice Marshall that the state cap should be subject to heightened constitutional scrutiny because the welfare cap affected the ability of the family’s children to receive basic sustenance.⁸⁴ The conservative Justices who prevailed in the case, however, saw no basis for heightened scrutiny and evaluated the cap under a standard of minimum rationality. Judge Wilkinson uses the case to contrast the liberal claim that the courts should eliminate “the disadvantages of which plaintiffs complained” against the conservative position that the Constitution does not confer entitlements.⁸⁵ But there is another aspect of *Dandridge* that deserves

traction of blood from an injured person over his objection did not violate due process).

⁸²See *Plyler v. Doe*, 457 U.S. 202, 243 (1982) (Burger, C.J., dissenting) (“The Court employs, and in my view abuses, the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver. That the motives for doing so are noble and compassionate does not alter the fact that the Court distorts our constitutional function to make amends for the defaults of others.”). The issue in *Plyler* was whether a state could withdraw funding reimbursement for the education of children of undocumented aliens. *Id.* at 205.

⁸³397 U.S. 471, 474, 487 (1970).

⁸⁴Wilkinson, *supra* note 7, at 755 (citing *Dandridge*, 397 U.S. at 522 (Marshall, J., dissenting)).

⁸⁵*Id.* In this respect, Judge Wilkinson’s critique echoes the views of many conservatives who see liberalism as an affront to individualism, while believing conservatism stands for the principle that “‘government’s principal functions are the preservation of freedom and removal of restraints on the individual.’” *Id.* at 754 (quoting George F. Will, *Conservative—With Conviction*, Wash. Post, Nov. 13, 1994, at C7). This, of course, is presenting conservatism in its most appealing form—that of the defender of individualism and freedom. Conservatives, however, seem hopelessly confused on the freedom issue. Only three pages after hailing conservatives as the protectors of individual freedom, Judge Wilkinson notes the argument that “‘in civil rights cases, ‘liberal judges generally seek’ to extend individual freedoms, while ‘conservative jurists generally prefer to limit such rights.’” *Id.* at 757 (quoting Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 *J. Am. Judicature Soc’y* 298, 299 (1993)). The fact is that neither side has a monopoly on championing freedom.

mention. The case was equally significant as part of an effort to lay the foundation for the argument that laws adversely affecting the poor, *as a class*, should merit heightened constitutional scrutiny.⁸⁶ Although the Court explicitly rejected this claim in a later case,⁸⁷ the debate over what types of groups merit particular constitutional solicitude better captures the jurisprudential divide between liberals and conservatives than does the issue of whether arguably overly sensitive judges should grant relief to particularly sympathetic litigants.⁸⁸ Liberal jurisprudence, on the one hand (as the *Dandridge* example attests), is concerned with using judicial power to protect marginalized groups in society. Conservative jurisprudence, on the other hand (as we shall see), is geared to reinforcing the powers of already dominant interests.

The rationale underlying liberal jurisprudence's efforts to protect marginalized groups is easy to understand. Normally judges should defer to the political processes in assessing the merits of particular legislation. Occasionally, however, the political processes cannot be completely trusted. This is particularly true when legislation adversely affects the interests of certain minority groups that have traditionally been the target of prejudice and political misdealing. Legislation that adversely affects such groups, accordingly, should be viewed with more exacting judicial scrutiny because the possibility of political abuse is manifest.

The pedigree for this line of thought dates back over sixty years to the famous footnote 4 of *United States v. Carolene Products Co.*,⁸⁹ and its themes have been consistently developed since that time—most powerfully by John Hart Ely in his landmark book, *Democracy and Distrust*.⁹⁰ Consistent with this theory, liberals have prevailed in gaining greater judicial scrutiny for legislation ad-

⁸⁶The intellectual foundation for treating the poor as a suspect class for equal protection purposes was set forth by Frank Michelman in his seminal article, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

⁸⁷See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17–18 (1973).

⁸⁸This is, of course, not the only line separating liberal and conservative thought. For an excellent and provocative discussion outlining the various differences between conservative and liberal jurisprudence, see Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich. L. Rev. 641 (1990).

⁸⁹304 U.S. 144, 152 n.4 (1938).

⁹⁰John Hart Ely, *Democracy and Distrust* (1980).

versely affecting blacks,⁹¹ women,⁹² aliens (in certain circumstances),⁹³ and illegitimate children.⁹⁴ They have attempted but failed to gain such status for the poor,⁹⁵ the elderly,⁹⁶ the mentally disabled,⁹⁷ and homosexuals.⁹⁸

The case for demanding special constitutional protection for many of the groups that have been denied such status is strong, but it is not the purpose of this Essay to develop those arguments.⁹⁹ Rather, for purposes of this discussion, it may be conceded that liberal attempts to expand the list of groups entitled to special constitutional solicitude may be criticized on the conservatives' oft-stated grounds that attempting to redress broad social concerns should be seen as a matter for the legislature, not the judiciary.¹⁰⁰ As Judge Wilkinson states, "For the judiciary to assign itself the

⁹¹ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (strict scrutiny).

⁹² *United States v. Virginia*, 518 U.S. 515, 533 (1996) (intermediate scrutiny).

⁹³ *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (strict scrutiny). Strict scrutiny does not apply when the discrimination is at the behest of the federal government. *Mathews v. Diaz*, 426 U.S. 67, 82 (1976) (using minimal scrutiny to uphold a federal law denying Medicare eligibility unless the alien has resided in the United States for five years and has been admitted for permanent residence). The Court has also failed to apply strict scrutiny to laws relating to the democratic process. See *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (using rational basis review to uphold a citizenship requirement for becoming a police officer).

⁹⁴ *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (intermediate scrutiny).

⁹⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973).

⁹⁶ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312–13 (1976).

⁹⁷ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

⁹⁸ *Romer v. Evans*, 517 U.S. 620, 631–32 (1996).

⁹⁹ For a particularly strong argument in favor of recognizing the poor as a suspect class, see, for example, Michelman, *supra* note 86.

¹⁰⁰ See, e.g., Wilkinson, *supra* note 7, at 762. Although deference to the legislature is the most commonly stated objection to liberal attempts to expand the list of constitutionally protected groups, other arguments are also possible. That one may have compassion for certain groups, for example, does not necessarily mean that such groups should be entitled to special constitutional status. Constitutionally favoring one group may lead to increased burdens being placed on less-favored groups. Too readily designating groups as meriting strict scrutiny may unnecessarily inhibit important government regulation. Drawing lines between a potentially limitless number of claimant groups to whom heightened constitutional protection should be applied and those to whom it should not can lead to arbitrary distinctions and undercut the purposes underlying heightened scrutiny in the first place. Opticians, for example, may be a politically vulnerable group, but should laws that discriminate against them be viewed under strict scrutiny? See, e.g., *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487–88 (1955) (applying minimal scrutiny to a law that treated opticians more harshly than optometrists and ophthalmologists).

goal of redressing general social inequalities is to set a task so impossibly large that it will come to corrupt what is good and distinctive in the remedial tasks that law can perform and accomplish.”¹⁰¹

The problem, however, is that the conservative Justices show little hesitation in doing exactly what they condemn when it serves their agenda. They seek favored constitutional status for their own chosen constituencies even though they assert that exercising judicial power to effectuate social policy is illegitimate. They strike down, rather than defer to, legislative attempts to alleviate societal disparities in wealth and power even though they claim that redressing social inequities is the province of the legislature.

The classic example of this behavior is in the affirmative action cases. Consider *Adarand Constructors v. Peña*, the case presenting a constitutional challenge to a federal set-aside program benefiting minority contractors.¹⁰² In that case, the conservative Justices held that the challenged program must meet strict scrutiny because it discriminated against whites.¹⁰³ They did so although whites form a clear majority of the national electorate and traditionally have not been targets of societal discrimination. They did so without support in constitutional text¹⁰⁴ or in constitutional history¹⁰⁵ and with the need to both overrule precedent¹⁰⁶ and develop an expansive concept of plaintiff’s standing in order to achieve their desired result.¹⁰⁷ And they did all of this in disregard of the considered judgment of political actors that affirmative action programs were necessary to

¹⁰¹ Wilkinson, *supra* note 7, at 762.

¹⁰² 515 U.S. 200, 211 (1995).

¹⁰³ *Id.* at 224.

¹⁰⁴ The Equal Protection Clause does not apply to the federal government. But see *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (holding that the Due Process Clause of the Fifth Amendment prohibited the maintenance of racially segregated schools by the District of Columbia).

¹⁰⁵ Historical evidence suggests that the framers of the Fourteenth Amendment did not intend to bar affirmative action. See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 *Yale L.J.* 427, 430–31 (1997); Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 *Nw. U. L. Rev.* 477, 556 (1998).

¹⁰⁶ See *Adarand Constructors*, 515 U.S. at 227 (overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)).

¹⁰⁷ See *supra* notes 67–79 and accompanying text.

assist minorities in achieving economic success and in integrating into the larger social power structure.¹⁰⁸

A similar pattern exists with respect to conservative decisions on gay rights. Conservative Justices have vehemently and caustically criticized the Court's decisions protecting gays from majoritarian action, proclaiming that such protection ignored the moral will of the community;¹⁰⁹ but when in *Boy Scouts of America v. Dale*¹¹⁰ the time came to determine whether the moral will of a community that had decided to bar discrimination based on sexual orientation should be enforced against a straight organization claiming it had a constitutional right to discriminate, the conservatives sided with the "straight" organization—even though it was the "straight" organization that was seeking to overturn majoritarian action.¹¹¹

Working from the premise that judicial intervention is most warranted when there are reasons to distrust the political processes, these decisions are perverse. White and straight majorities are not vulnerable classes.¹¹² Blacks and homosexuals are.¹¹³ Yet white and straight groups are given judicial relief from laws that were passed by politics in which they were the political majority. Meanwhile, double burdens are placed on the less politically powerful groups. First, they must navigate through difficult political waters in order to attract enough members of opposing groups to support their legislative initiatives. Second, they must face the possibility that a hostile court will invalidate their legislative victories.

The conservative Justices' tendency to protect entrenched interests at the expense of marginalized groups is also demonstrated by

¹⁰⁸ *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340–41 (2003) (discussing the policies supporting affirmative action).

¹⁰⁹ See *Lawrence v. Texas*, 123 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

¹¹⁰ 530 U.S. 640 (2000).

¹¹¹ *Id.* at 644.

¹¹² To be sure, the case for judicial intervention to invalidate an affirmative action program is stronger under a "democracy and distrust" approach in a community with a majority-minority population than one with a majority-majority population. See generally *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating a minority set-aside program in a city with a majority-minority population).

¹¹³ But see *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) ("It is . . . nothing short of preposterous to call 'politically unpopular' a group which enjoys enormous influence in American media and politics, and which, . . . though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2 . . .").

their opposition to legislative efforts designed to help level the political playing field.¹¹⁴ In First Amendment decisions, for example, conservatives have consistently voted to strike down government provisions that attempt to weaken the dominance that entrenched interests have over public discourse. Thus, in campaign finance cases, the conservative Justices have repeatedly opposed efforts that would lessen the influence of money in politics. They have invalidated limits on independent political party expenditures on behalf of political candidates,¹¹⁵ sought to strike down limits on a political party's coordinated expenditures with candidates¹¹⁶ (although prevailing on this issue would undermine the Supreme Court decision in *Buckley v. Valeo*,¹¹⁷ upholding individual campaign contributions¹¹⁸), and have stated that they would overrule *Buckley's* approval of contribution limitations altogether.¹¹⁹ They recently dissented in *McConnell v. FEC*¹²⁰ a case that upheld, among other campaign reforms, limits on corporate campaign expenditures and, in so doing, rejected the majority's rationale that such limits were permissible as justifiable attempts to deal with "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."¹²¹ In all of these cases the effects of the conservatives' position are the same: The powers of the wealthy to participate in and affect political deci-

¹¹⁴Indeed, in the census case, conservatives went so far as to oppose attempts to assure that the disaffected individuals would be counted for the purposes of apportioning political power. See generally *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999) (striking down the use of statistical sampling as a method to count the population for purposes of political apportionment).

¹¹⁵*Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 631 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

¹¹⁶*Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (Thomas, J., dissenting).

¹¹⁷424 U.S. 1 (1976).

¹¹⁸A donor who had given the maximum amount to a particular candidate could then simply donate additional monies to the political party, knowing it would be directed to her chosen candidate's campaign. See *Fed. Election Comm'n v. Colo. Campaign Comm.*, 533 U.S. at 447.

¹¹⁹*Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410 (2000) (Scalia & Thomas, JJ., dissenting).

¹²⁰124 S. Ct. 619 (2003).

¹²¹*Id.* at 695 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)); see *id.* at 720 (Scalia, J., dissenting); *id.* at 729 (Thomas, J., dissenting); see also *Austin*, 494 U.S. at 684 (Scalia, J., dissenting) (quoting *id.* at 660). Justice Thomas was not yet on the Court for the *Austin* decision.

sionmaking are protected,¹²² and the ability of government to address resource-based disparities in the political process is denied.

Conservative Justices have taken a similarly hard line in addressing the government's ability to regulate in favor of expanding the diversity of voices heard in the media. They dissented in a case that upheld an FCC provision requiring cable operators to carry local television stations,¹²³ voted to overturn a Court decision upholding a provision promoting minority ownership of broadcast outlets,¹²⁴ and have stated that they would invalidate cable access requirements as well.¹²⁵ Their message in these cases again is clear: First Amendment concerns rest solely with ownership interests. That the purpose of the media access requirements is to open up the marketplace of ideas to wider debate is of no significance.¹²⁶ As Justice Thomas wrote in *Denver Area Educational Telecommunications Consortium v. FCC*, “[Although a previous decision had indicated that] . . . ‘[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount’ . . . that view can no longer be given any credence in the cable context. It is the operator’s right that is preeminent.”¹²⁷

The conservatives’ positions in the campaign finance and media access cases could be defended as simply representing a strong commitment to First Amendment freedom, but that position is belied by their positions in other free speech cases. For example, in the *Denver* case, Justice Thomas would have upheld a requirement that cable operators block any “indecent” leased access program-

¹²² See, e.g., Jonathan D. Salant, Analysis: Key House Votes Coincide with Biggest Donations, *Chi. Trib.*, July 22, 2003, § 1, at 18 (citing an analysis of campaign finance data showing a correlation between interest groups who outspent their opponents and success in House of Representatives votes). But see Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 *Yale L.J.* 1049, 1057–58 (1996) (refuting the assumptions that money buys elections and is a “corrupting influence on the legislature”).

¹²³ *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 229 (1997) (O’Connor, Scalia, Thomas, & Ginsburg, JJ., dissenting).

¹²⁴ *Adarand Constructors*, 515 U.S. at 227 (overruling *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)).

¹²⁵ See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part).

¹²⁶ See Owen M. Fiss, Free Speech and Social Structure, 71 *Iowa L. Rev.* 1405, 1410 (1986).

¹²⁷ 518 U.S. at 816 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

ming the operator wanted to show even as he was indicating that he would strike down cable access requirements.¹²⁸ Justice Scalia, in turn, dissented in *McIntyre v. Ohio Elections Commission*,¹²⁹ which struck down a restriction on anonymous campaign literature distribution, a campaign tactic popular with marginalized groups.¹³⁰ Meanwhile, both Justice Scalia and Justice Thomas have opposed efforts to expand the public forum doctrine, which would allow speakers who do not have the resources to gain access to the institutional media to more effectively reach listeners and disseminate their messages.¹³¹

Nowhere, however, is the conservatives' penchant for exacerbating the disparities between the empowered and disaffected segments of society clearer than in judicial access cases. In these cases, conservative Justices have routinely resisted judicial and legislative attempts to promote the rights and abilities of marginalized litigants to have access to the courts. The result is that powerful interests can violate the rights of the disadvantaged and walk away unscathed, while disadvantaged litigants, who already face resistance on the merits of their issues, are denied the opportunity to raise their claims in the first place.¹³²

¹²⁸Id. at 837–38 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹²⁹514 U.S. 334 (1995).

¹³⁰Id. at 371 (Scalia, J., dissenting). Justice Scalia has also shown little deference to First Amendment rights in cases involving sexually explicit speech. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 267 (2002) (Rehnquist, C.J. & Scalia, J., dissenting); *United States v. Playboy Entm't Group*, 529 U.S. 803, 835 (2000) (Rehnquist, C.J., O'Connor, Scalia, & Breyer, JJ., dissenting). To be sure, Justice Scalia did take a strong free speech position in voting to strike down laws prohibiting flag burning. *United States v. Eichman*, 496 U.S. 310, 312 (1990); *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

¹³¹See generally *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (holding an airport terminal not a public forum); *United States v. Kokinda*, 497 U.S. 720 (1990) (holding a sidewalk in front of a post office not a public forum). Justice Thomas was not yet on the Court for the *Kokinda* decision.

¹³²In this respect, Judge Wilkinson's insights are again worthwhile. As we have seen, his argument is most persuasive in its demonstration of how compassion can often be found on both sides of litigation. As he argues, providing relief to the individual litigant can interfere with the enjoyment of the rights of the collective, and the decision as to where most compassion lies can be difficult to ascertain. Of course, in order for the compassion that may exist on both sides of a dispute to be weighed and understood, both sides of a suit must actually be represented. Conservatives apparently fall short, however, in recognizing this most obvious of propositions.

The conservative record limiting the rights and abilities of disadvantaged litigants to have judicial access is long and consistent. Conservatives have turned away low-income litigants challenging court costs and other such expenses that prevent indigents from being able to litigate their interests. They have stated their intent to overturn a forty-year-old precedent and deny indigent criminal defendants access to trial transcripts necessary to maintain criminal appeals.¹³³ They have rejected challenges to legal services funding restrictions that would prevent legal assistance lawyers from raising challenges to welfare laws and other government regulations,¹³⁴ even if the grounds for those challenges became known during already existing representation,¹³⁵ and even if denying the ability of the legal services lawyer to bring the challenge would effectively prevent the issue from being litigated.¹³⁶ They have drastically cut back on the rights of prisoners to have access to law libraries and other such materials necessary to prepare for litigation.¹³⁷ They have, as discussed above, placed greater standing barriers on marginalized litigants than on members of more powerful interests.¹³⁸

Conservative resistance to providing judicial access for the disadvantaged may have reached its zenith this last Term in *Brown v. Legal Foundation of Washington*.¹³⁹ *Brown* involved a challenge to a program that provided funding for legal services to the poor on the grounds that the funding mechanism constituted an unconstitutional taking.¹⁴⁰ The funding program in question, Interest on Law-

¹³³ See *M.L.B. v. S.L.J.*, 519 U.S. 102, 139 (1996) (Thomas, J., dissenting) (stating that *Griffin v. Illinois*, 351 U.S. 12 (1956), should be overruled).

¹³⁴ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549–50 (2001) (Scalia, J., dissenting).

¹³⁵ *Id.* at 539.

¹³⁶ *Id.* at 547 (“Congress’s . . . restriction operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges . . .”). To this point, Justice Scalia responded simply, “So what?” *Id.* at 556 (Scalia, J., dissenting).

¹³⁷ See, e.g., *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (limiting the right of prisoner access to legal materials recognized in *Bounds v. Smith*, 430 U.S. 817 (1977)).

¹³⁸ See supra notes 67–79 and accompanying text. A particularly dramatic example of the barriers that the conservatives have erected in the way of standing may be found in *Lewis*, 518 U.S. at 343. In that case the conservatives held that in order for a prisoner to be able to challenge a provision restricting his access to legal materials to assist in his appeal, he would have to show that his appeal would have been successful if he were allowed such access. *Id.* at 349–59.

¹³⁹ 123 S. Ct. 1406 (2003).

¹⁴⁰ See *id.* at 1411.

yers' Trust Accounts ("IOLTA") used interest on lawyers' trust accounts to pay for legal services for the needy. The program operated by mandating that attorneys holding client funds pool those funds in interest bearing bank accounts. The interest earned from those accounts was then used to fund organizations that provide legal services. Importantly, only client funds that could not earn interest for their owner could be used in the pooled accounts,¹⁴¹ and, for this reason, proponents of the IOLTA plans believed the programs ingenious because money for legal services could be generated presumably without cost or harm to the clients whose funds served as principal. Nevertheless, litigants who opposed legal services funding challenged IOLTA programs on grounds that they were unconstitutional takings.¹⁴²

After an earlier case held that the interest earned on client funds in IOLTA accounts was the private property of the client for Takings Clause purposes,¹⁴³ the question in *Brown* was whether that taking was unconstitutional for lack of just compensation.¹⁴⁴ The majority held that no compensation was required because the client suffered no pecuniary loss.¹⁴⁵ The fact that the affected client funds could not earn interest income meant that no compensation was required.

The conservative Justices dissented.¹⁴⁶ To the conservatives, the result in the case was no less than judicially endorsed class warfare. In the words of Justice Scalia:

Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by

¹⁴¹Such funds would include those of insubstantial amounts, those held for short periods of time, or other such funds for which the costs of administering the account would exceed any interest earned by the client. See *id.* at 1413.

¹⁴²See, e.g., *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835 (9th Cir. 2001) (challenging the Washington State IOLTA program).

¹⁴³*Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

¹⁴⁴The Court also discussed whether devoting the funds to legal services constituted a public use, although that issue had apparently not been raised below. See *Brown*, 123 S. Ct. at 1422 n.2 (Scalia, J., dissenting).

¹⁴⁵See *id.* at 1419–21.

¹⁴⁶*Id.* at 1422 (Rehnquist, C.J., Scalia, Kennedy, & Thomas, JJ., dissenting).

the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended. One must hope that that is the case. For to extend to the entire run of Compensation Clause cases the rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous.¹⁴⁷

Apparently not wanting to be associated with the likes of Robin Hood, the conservatives decided that it would be better to void the program even though the plaintiffs had suffered no monetary harm¹⁴⁸—even if invalidating the IOLTA program would seriously threaten the continued viability of legal services programs.¹⁴⁹ For the conservatives, just compensation was to be determined by the fair market value of the property and not the net loss to the plaintiffs (zero). The fact that the property had, or could have, no value outside the IOLTA program was irrelevant to the dissenters.¹⁵⁰

Undoubtedly, the takings issue in *Brown* was difficult. One would think, however, that if conservatism were truly compassionate, the dissenters would have joined the majority. To begin with, the conservatives in *Brown* could not rely on their old argument of deferring to state political judgments—IOLTA programs had been

¹⁴⁷Id. at 1428 (Scalia, J., dissenting).

¹⁴⁸The plaintiffs requested injunctive relief to void the program rather than monetary relief for themselves on grounds that recovering “small amounts” through litigation would be impractical. Id. at 1417.

¹⁴⁹See generally Katharine L. Smith, IOLTA in the Balance: The Battle of Legality and Morality Between Robin Hood and the Miser, 34 St. Mary's L.J. 969, 981–82 (2003) (describing the importance of IOLTA funds to civil legal services). Had the conservatives succeeded, the viability of legal services organizations, already hard hit by federal funding cuts, would have been further threatened. IOLTA programs, which generated over \$200 million in 2001, are the second largest source of funding for civil legal services. Id. The largest source is the federally funded Legal Services Corporation (“LSC”), with a 2001 budget of \$330 million. David Luban, Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers, 91 Cal. L. Rev. 209, 211 n.5 (2003). The dependence of legal services programs on IOLTA proceeds, moreover, is likely to increase due to a recent reduction in LSC providers and a shift toward state-based funding. See Smith, *supra*, at 981–82.

¹⁵⁰See *Brown*, 123 S. Ct. at 1424 (Scalia, J., dissenting) (“The conclusion that [the property] is devoid of value because of the circumstances giving rise to its creation is indefensible.”).

enacted in all fifty states.¹⁵¹ Nor could the conservatives claim it was outside their province to redress social inequities by promoting legal services for the needy because, in this case, they were only being asked to defend such a program, not proactively create one.¹⁵² There was also, to use Judge Wilkinson's formulation, no case to be made that compassion existed on both sides of the litigation. The plaintiffs' financial losses were so insignificant that they argued they should be granted injunctive relief voiding the program rather than money damages because the amounts sought for compensation were so small as to "render recovery through litigation impractical."¹⁵³ (The suit was apparently more an effort to curtail the funding of the legal services program than it was an attempt to make the plaintiffs whole.¹⁵⁴) On the other side, funding a program designed to promote judicial access for those who cannot afford representation should be seen as central to the interests of justice. Over 125 years ago in *Windsor v. McVeigh*, the Court described the right to be heard as lying "at the foundation of all well-ordered systems of jurisprudence."¹⁵⁵ Contemporary conservative jurisprudence as evidenced in *Brown* and the other judicial access cases apparently does not recognize even this most basic principle.

Nevertheless, the conservatives' judicial access decisions are consistent with the broader conservative pattern that we have seen so far. Conservative sympathies rest with the established and not the disaffected. Even with respect to matters involving access to justice, the one area where all members of the legal community

¹⁵¹ All fifty states and the District of Columbia have adopted IOLTA programs to pay for legal services for the poor. *Id.* at 1411. Five IOLTA programs were enacted by state legislatures; the rest were adopted by rules of the highest court in the state. *Id.* at 1411 n.2.

¹⁵² Indeed, if compassionate jurisprudence meant anything, it should have led the conservatives to uphold the IOLTA program precisely because the takings issue in *Brown* was difficult and novel. Compassionate conservative jurisprudence, we are told, does not require that judges "exclude compassion from their decisions" when the law is not clear. See Wilkinson, *supra* note 7, at 761.

¹⁵³ *Brown*, 123 S. Ct. at 1417.

¹⁵⁴ The attack on legal services funding mounted in *Brown* was not, as Professor Deborah Weissman shows, anomalous. In fact, legal services funding has been under siege from conservative forces in virtually all quarters. See Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 *Wm. & Mary L. Rev.* 737, 757-85 (2002).

¹⁵⁵ 93 U.S. 274, 277 (1876).

should unite, the conservatives do not acknowledge the value of broadening the class of persons able to gain access to justice. In his essay, Judge Wilkinson writes, “no amount of other virtues could ultimately compensate for a jurisprudence that was not, in the end, humanely grounded.”¹⁵⁶ The conservatives’ vigilant opposition to judicial access for the disadvantaged does not fare well through this lens.

CONCLUSION

At the end of his essay, Judge Wilkinson argues that we should work to minimize the polarization that currently exists in the legal culture.¹⁵⁷ The point is well taken. On the one hand, political civility is undermined when one reflexively brands one’s opponents, and mutual understanding is not promoted when the primary criticism of one’s opponents is reduced to labels.¹⁵⁸ On the other hand, positively describing one’s own ideology as virtuous does not make it so.

Such is the case with Judge Wilkinson’s assertion that conservative jurisprudence is compassionate. Certainly, the argument can be made that compassion is not fostered when courts react more to the plight of sympathetic litigants than to rules of law. It may also be fairly asserted that in order to foster compassion, the individualized concerns present in collective interests must be recognized

¹⁵⁶Wilkinson, *supra* note 7, at 770. I suspect that some might argue that conservative jurisprudence is “humanely grounded” because, by protecting the prerogative of entrenched interests, it serves to maximize the overall wealth in society, benefitting both the advantaged and the disadvantaged. See e.g. Richard A. Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 977–78 (1984). But while this argument may offer some defense to the conservatives’ property and economic rights decisions (although even then it could be labeled as no more than a notion of “trickle-down justice”), it has little application to the antidiscrimination and access to justice cases. For example, although limiting the ability of the disadvantaged to gain access to the courts might help in achieving judicial efficiency and in reducing transaction costs generally, there is little claim that such action is jurisprudentially humane. After all, as Judge Posner reminds us, “there is more to justice than economics.” Richard A. Posner, *Economic Analysis of Law* 28 (6th ed. 2003).

¹⁵⁷Wilkinson, *supra* note 7, at 770–71.

¹⁵⁸Of course, dissenting opinions that accuse the Court majority of falling victim to the homosexual agenda, see *Lawrence v. Texas*, 123 S. Ct. 2474, 2496 (2003) (Scalia, J., dissenting), or acting like Robin Hood, see *Brown*, 123 S. Ct. at 1428 (Scalia, J., dissenting), are also not helpful in this respect.

along with the particular interests of individual litigants. Judge Wilkinson makes both arguments effectively. But the conservatism he describes is not that of the conservative wing of the Supreme Court. Contemporary conservative jurisprudence does not shy away from using sympathy toward its preferred constituencies in reaching judicial decisions, and it is not afraid to reject collective concerns that oppose those interests when it deems it appropriate. More significantly, contemporary conservative jurisprudence is not reluctant to use its power to reinforce the prerogatives of entrenched interests even as it condemns the use of judicial power to protect the interests of marginalized groups. To describe such a jurisprudence as compassionate is to remove all content from the meaning of the word.